

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-235328-rdd

4 Adv. Case No. 19-08286-rdd

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6 In the Matter of:

7

8 SEARS HOLDINGS CORPORATION

9

10 Debtor.

11 - - - - - x

12 SAYVILLE MENLO LLC

13 Plaintiff,

14 v.

15 TRANSFORM HOLDCO LLC ET AL

16 Defendants.

17 - - - - - x

18

19 United States Bankruptcy Court

20 300 Quarropas Street, Room 248

21 White Plains, NY 10601

22

23 December 10, 2020

24 10:04 AM

25

1 B E F O R E :

2 HON ROBERT D. DRAIN

3 U.S. BANKRUPTCY JUDGE

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5 ECRO: JUSTIN WALKER

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1 HEARING re Notice of Agenda of Matters Scheduled for  
2 Telephonic Hearing on December 10, 2020 at 10:00 a.m.

3  
4 HEARING re Final Fee Application of Deloitte & Touche LLP  
5 for Compensation for Services Rendered and Reimbursement of  
6 Expenses Incurred as Independent Auditor and Advisor for the  
7 period: 10/15/2018 to 10/31/2019, fee:\$2,476,936.00,  
8 expenses: \$47,154.66 (ECF #9016)

9  
10 Adversary proceeding: 19-08286-rdd Sayville Menlo LLC v.  
11 Transform Holdco LLC et al

12 HEARING re Motion to Approve / Defendants Motion to Enforce  
13 Order Granting in Part and Denying in Part Defendants Motion  
14 to Dismiss the Amended Complaint with Prejudice (ECF #25)

15  
16 Adversary proceeding: 19-08286-rdd Sayville Menlo LLC v.  
17 Transform Holdco LLC et al

18 HEARING re Opposition Brief (related document(s)25) filed by  
19 Anthony J D'Artiglio on behalf of Sayville Menlo LLC. (ECF  
20 #30)

21  
22 Adversary proceeding: 19-08286-rdd Sayville Menlo LLC v.  
23 Transform Holdco LLC et al

24 HEARING re Order signed on 1/9/2020 Granting in Part and  
25 Denying in Part Defendant's Motion to Dismiss the Amended

1 Adversary Proceeding (Related Doc# 14) (ECF #23)  
2 Adversary proceeding: 19-08286-rdd Sayville Menlo LLC v.  
3 Transform Holdco LLC et al  
4 HEARING re So Ordered Stipulation and Scheduling Order  
5 Signed on 11/12/2020 Concerning the Defendant's Motion to  
6 Enforce (ECF #29)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 ANSELL GRIMM & AARON

4 Attorney for Sayville Menlo, LLC

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6 Woodland Park, NJ 07424

7

8 BY: JOSHUA BAUCHNER (TELEPHONICALLY)

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15 BY: LUKE BAREFOOT (TELEPHONICALLY)

16 SAMUEL LEVANDER (TELEPHONICALLY)

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18 WEIL GOTSHAL & MANGES

19 Attorneys for Debtors

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21 New York, NY 10153

22

23 BY: JACQUELINE MARCUS

24 JENNIFER CROZIER

25 JARED FRIEDMANN

1 DELOITTE AND TOUCHE

2 Independent Auditor and Accounting Advisor for Debtor

3 30 Rockefeller Plaza, 41st Floor

4 New York, NY 10112

5  
6 BY: RONALD YOUNG

7  
8 ALSO APPEARING TELEPHONICALLY:

9 PAUL HARNER, Fee examiner

10 TOBAY DALUZ

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1 P R O C E E D I N G S

2 THE COURT: Good morning. This is Judge Drain.  
3 We're here on a Sears omnibus day. This hearing is  
4 completely telephonic. You should identify yourself and  
5 your client, therefore, the first time that you speak. It's  
6 also a good idea to do that thereafter, so that the court  
7 reporter can put together your voice with your name.

8 There's one authorized recording of today's  
9 hearings. It's taken by Court Solutions. If you want to  
10 order a transcript of your matter, you should contact our  
11 clerk's office to arrange for the production of one. Court  
12 Solutions provides a copy of the recording to clerk's office  
13 on a daily basis.

14 Because these hearings are all on a telephonic  
15 basis, you should keep yourself on mute unless you speak, at  
16 which point, of course, you should unmute yourself.

17 So, with that introduction, I have the revised  
18 agenda that came in this morning. I'm happy to go down  
19 that; although, I'm happy to take any sort of initial report  
20 as well if the Debtors' counsel wants to make one.

21 MS. MARCUS: Good morning, Your Honor. Jacqueline  
22 Marcus, Weil Gotshal & Manges on behalf of the Debtors.

23 Actually, we didn't prepare any formal remarks  
24 today, so we were just going to go right into the agenda,  
25 which, as you know, based on the amended agenda, is rather

1 short. The first matter on the agenda is the final fee  
2 application of Deloitte and Touche, and Mr. Roland Young  
3 from Deloitte will address the Court regarding that matter.

4 THE COURT: Okay.

5 MR. YOUNG: Good morning, Your Honor, Roland  
6 Young, in-house counsel for Deloitte, representing Deloitte  
7 and Touche. Deloitte and Touche was retained as the  
8 independent auditor and accounting advisor in this case,  
9 performed services from the inception of the case through  
10 October 31st, 2019. In the final fee application, Deloitte  
11 and Touche requested fees of \$2,476,936 and expenses of  
12 \$47,154.66. We did have extensive interaction with the fee  
13 examiner throughout the case, and in the final fee  
14 application, we noted a reduction of \$125,000 related to the  
15 -- primarily the fees in the first interim fee application.

16 Subsequent to the filing of the final fee  
17 application, we had further interaction with the fee  
18 examiner and agreed to an additional reduction, which is not  
19 reflected on the fee application itself of \$10,000 and those  
20 relate primarily to the fees which are relatively modest in  
21 the second and third interim fee application.

22 We have -- I have circulated a proposed order to  
23 the fee examiner and to Debtors' counsel and once  
24 everybody's signed on that -- off on that, would propose to  
25 submit it to chambers for Your Honor. Please let me know if



1 there's any questions you might have regarding the fees.

2 THE COURT: Okay. And I'm assuming that no other  
3 developments then, the additional reduction that you just  
4 mentioned.

5 MR. YOUNG: That's correct.

6 THE COURT: Okay. Did anyone else have anything  
7 to say on the Deloitte final fee application?

8 MR. HARNER: Your Honor, very briefly. Good  
9 morning. It's Paul Harner as the fee examiner. Just to --  
10 for the Court's information, first of all, Mr. Young's  
11 summary is absolutely correct. That does reflect agreement  
12 with the fee examiner after review of the various interim  
13 applications and the final application, and I would also  
14 just note for the Court's information, that Mr. Young and  
15 his colleagues were very quickly responsive, not only to our  
16 formal preliminary reports, but to our various concerns, and  
17 the matters were easily resolved, so we appreciate their  
18 cooperation. Thank you, Your Honor.

19 THE COURT: Okay. Very well. All right. I have  
20 reviewed the final application and also during the course of  
21 the case dealt with the interim applications. The vast bulk  
22 of Deloitte's fees are for audit services. Given the role  
23 of the fee examiner in this case and my review of the  
24 application, I will grant the application, which is  
25 unopposed, in the revised amount sought. Any issues I

1 could've had on most of the work are well subsumed within  
2 the \$125,000 agreed reduction.

3 I did have some question about sort of the dribs  
4 and drabs of the last period, but I think those are dealt  
5 with by the additional agreed reduction of \$10,000. So,  
6 counsel for Deloitte can email chambers the proposed order  
7 with Schedules A and B laying out the interim and final  
8 awards in those schedules. You don't need --

9 MR. YOUNG: Thank you, Your Honor.

10 THE COURT: -- settle that on any -- you don't  
11 need to formally settle that on anyone, but you should copy  
12 Mr. Harner and Debtors' counsel when you send it, when you  
13 email to chambers.

14 MR. YOUNG: Very good. Will do. Thank you, Your  
15 Honor.

16 THE COURT: Okay, thank you.

17 MR. HARNER: With that, Your Honor, may Ms. Daluz  
18 and I be excused, please?

19 THE COURT: Yes. That's fine.

20 MS. DALUZ: Thank you, Your Honor.

21 MR. HARNER: Thank you, Your Honor.

22 MR. YOUNG: I'll plan to hang up as well. Thank  
23 you again.

24 THE COURT: Okay.

25 MS. MARCUS: Jacqueline Marcus again, Your Honor.

1 The next matter and the last matter, actually, is a matter  
2 involving an adversary proceeding between Sayville Menlo,  
3 LLC and Transform Holdco. That will be handled by Mr.  
4 Barefoot from Cleary, and Your Honor, I'd request that a  
5 number of the Weil attorneys who are on this phone be  
6 permitted to leave the call, since it doesn't affect the  
7 Debtors.

8 THE COURT: Sure, that's fine.

9 MS. MARCUS: Thank you.

10 MR. BAREFOOT: Good morning, Your Honor. Luke  
11 Barefoot from Cleary, Gottlieb, Steen, and Hamilton, LLP on  
12 behalf of Transform Operating Stores.

13 THE COURT: Morning.

14 MR. BAUCHNER: And Good morning, Your Honor.  
15 Joshua Bauchner with Ansell, Grimm, and Aaron on behalf of  
16 Sayville Menlo, LLC.

17 THE COURT: Morning.

18 MR. BAREFOOT: -- Barefoot from Cleary for  
19 Transform. I just wanted to note as a housekeeping matter  
20 that literally about one moment ago, I just saw a  
21 supplemental or corrected memorandum of law filed in this  
22 matter by Sayville. I haven't had an opportunity to review  
23 that, and so won't really be prepared at this hearing to  
24 comment on that or what has changed in that, and would  
25 propose --

1 THE COURT: Well, with that, is that in addition  
2 to the objection?

3 MR. BAREFOOT: Your Honor, it appears to be a  
4 corrected version of the objection that was filed, but I  
5 can't readily tell what has changed in the pleading that was  
6 just filed.

7 THE COURT: Mr. Bauchner --

8 MR. BAUCHNER: Your Honor --

9 THE COURT: -- is it just a correction for typos  
10 and things of the objection?

11 MR. BAUCHNER: Exactly, Your Honor. To be  
12 precise, on Page 13, the first sentence of Section 3 was  
13 omitted. It's an introductory sentence. It's just to make  
14 sure the record is clear. We apologize. We just discovered  
15 it this morning in preparation for the hearing, but it  
16 doesn't materially change anything here. We just wanted to  
17 --

18 THE COURT: Okay.

19 MR. BAUCHNER: -- add that introductory sentence  
20 so that the record was clear. But no --

21 THE COURT: Okay. Very well.

22 MR. BAUCHNER: -- other significant moment. Thank  
23 you.

24 THE COURT: All right.

25 MR. BAREFOOT: Your Honor, Luke Barefoot from

1 Cleary for Transform again. Subject to Your Honor's  
2 preference, I'd propose to proceed with a brief introductory  
3 argument and turn it over to Sayville.

4 THE COURT: All right. I mean, you both can  
5 assume that I've reviewed Transform's motion, Sayville's  
6 objection, and Transform's reply, as well as the underlying  
7 order that's at issue with regard to this motion, which is  
8 my order, dated January 9, 2020, the transcript of the  
9 December hearing that led to that order, and Mr.  
10 D'Artiglio's letter to Justice Jamieson which I think  
11 prompted the filing of this motion, which is dated October  
12 28, 2020.

13 I've reviewed the other exhibits, too, but I view  
14 those as the primary documents relevant to today's motion.

15 MR. BAREFOOT: Understood, Your Honor, and I will  
16 try to be as brief as possible, with that in mind.

17 THE COURT: Okay.

18 MR. BAREFOOT: Your Honor, Luke Barefoot again  
19 from Cleary. We're here this morning on the adversary  
20 proceeding captioned Sayville Menlo v. Transform Operating  
21 Stores, LLC, Case No. 19-08286.

22 On Transform's motion to enforce the January 2020  
23 order dismissing with prejudice claims against Transform  
24 that arose prior to the assumption and assignment, based on  
25 Transform -- Sayville's failure to file an objection in

1 response to the cure notice as was required by this Court's  
2 bidding procedures order.

3 I just want to emphasize that the relief that  
4 Transform is seeking requires no factual determinations by  
5 this Court, and only requires the Court to confirm what we  
6 believe are the plain terms of the dismissal order, the  
7 bidding procedures order, and Section 365 to prevent  
8 Sayville's efforts to evade and collaterally attack the  
9 dismissal order.

10 As the record reflects, Your Honor, since the time  
11 of the dismissal order, the parties have recommenced the  
12 state court litigation in accordance with the Court's  
13 directions, but Sayville has advanced there, pursuant to the  
14 letter to judge -- Justice Jamieson that Your Honor  
15 referenced, what we believe is an untenable reading of the  
16 dismissal order, under which, the only claims that would be  
17 barred are those that the landlord specifically and formally  
18 noticed as defaults prior to assumption and assignment.

19 That reading is at odds with the terms of the  
20 bidding procedures order, the record of the proceedings  
21 before this Court on the motion to dismiss, and the purpose  
22 and structure of 365. Specifically, the landlord's  
23 interpretation would allow this landlord and other landlords  
24 to remain silent and lie in wait to assert claims against  
25 buyers in contravention of the protections of bidding

1 procedures orders.

2 Very briefly, Your Honor, at base, the landlord's  
3 core contention on the interpretation of the dismissal order  
4 is refuted simply by reading the Court's rationale,  
5 articulated from the bench, as to why it was granting the  
6 motion to dismiss as to unasserted, pre-assignment defaults.

7 If you go to the transcript of the December 13th,  
8 2019 hearing at 161 Line 2, the Court reasoned: "I believe  
9 that the landlord is now time barred to assert a claim for  
10 damages or for specific performance, since the specific  
11 performance can be quantified for breach of contract for  
12 anything that could be said to be owing, either as a fixed  
13 or unliquidated amount, i.e., necessary (sound drops) make  
14 the claimed repairs pre-assignment."

15 The Court went on to say, at Page 161, 14 to 18:  
16 "I'm going to grant the motion to dismiss with respect to  
17 the contract claim for those pre-assignment amounts that  
18 could have been asserted, either as a liquidated amount or  
19 an amount that could be described and on a liquidated  
20 basis."

21 It's important to note that the Court's rationale  
22 turned on amounts that could have been asserted, not amounts  
23 that were asserted or that could have said to be owing, not  
24 amounts that had been asserted. Nowhere did the Court's  
25 rationale examine or turn on the terms of the lease, the

1 mechanism for noticing defaults under the lease, if any, or  
2 whether a default was formally noticed. We believe this is  
3 consistent with the decisions we cited in our papers of  
4 other Courts that specifically reject contract  
5 counterparties' efforts to employ this kind of a lie-in-wait  
6 tactic.

7 Turning to the landlord's assertion that the  
8 dismissal order's text itself supports its interpretation,  
9 they focus on the fact that the dismissal order refers to  
10 defaults under the lease. First, it's important, Your  
11 Honor, that the term default there is lower case, undefined.

12 Moreover, the reference to defaults under the  
13 lease serves only to specify the source of the obligations,  
14 not to create a loophole where defaults that weren't noticed  
15 prior to assignment somehow were outside of the bidding  
16 procedures order.

17 If you look at Paragraph 4 of the dismissal order,  
18 it puts to rest any interpretation that the landlord is now  
19 asserting. It specifically holds that to the extent that  
20 any repairs are required under the lease, all pre-assumption  
21 costs shall be the sole responsibility of the plaintiff,  
22 notwithstanding anything in the lease to the contrary. So,  
23 the terms of the order specifically refute any suggestion  
24 that the terms and mechanisms of the lease, rather than the  
25 mechanisms of the bidding procedures order, governed.



1           Finally, Your Honor, the fact that the order does  
2           not expressly reference Section 365 of the Code does nothing  
3           to change this. This is particularly the case where the  
4           dismissal order is itself based on an interpretation and  
5           enforcement of the bidding procedures order, which, by its  
6           expressed terms, was entered pursuant to the authority under  
7           Section 365.

8           Your Honor, I'll just respond very briefly to the  
9           other contentions that the landlord raises in its opposition  
10          papers. First, Your Honor, the landlord asserts that to  
11          enter the order that Transform is request, would interfere  
12          with the state court's jurisdiction, but this Court's  
13          dismissal order expressly retains jurisdiction to interpret  
14          and enforce its own order, and this is particularly  
15          important, Your Honor, where the dismissal order itself is  
16          based on an interpretation of this Court's own bidding  
17          procedures order.

18          While Transform is understandably reluctant to  
19          burden this Court's docket, it was necessitated to avoid  
20          plaintiff's efforts to evade or undermine the dismissal  
21          order through collateral attacks in the state court.

22          Second, Your Honor, to the extent that the  
23          plaintiff argues that Transform is judicially estopped from  
24          arguing that certain defaults, in fact, arose prepetition,  
25          they ignore the standard for judicial estoppel as well as

1 the procedural posture of the dismissal order, which arose  
2 on a motion to dismiss. Of course, on a motion to dismiss,  
3 Transform was required to accept the allegations in the  
4 complaint as true, and can't be estopped from contesting  
5 those allegations later when the facts educed in discovery  
6 suggest otherwise.

7 The Court also never adopted or took any position  
8 on the allegations, given the procedural posture of a motion  
9 to dismiss. The Court's colloquy at the hearing also made  
10 express that the allegations were not the limit. If you  
11 look again at the transcript of the dismissal hearing, Page  
12 151, Line 16, the Court expressly said, "And that number  
13 isn't the cap on what is the landlord's. If Transform can  
14 show that, you know, in addition, these other costs were  
15 there, pre-assignment, then that would be the landlord's,  
16 too, because they weren't asserted."

17 Third, Your Honor, plaintiff's allegations of what  
18 they call fraud on the Court not only lack evidence, but  
19 they're simply neither here nor there, in terms of the issue  
20 that's before the Court, which is the terms of the dismissal  
21 order. They focus specifically on a deposition of a  
22 representative witness of Transform.

23 First, many of the inconsistencies that they point  
24 to are between positions of the Debtors and positions of  
25 Transform, which are distinct entities, and Transform has

1       been found not to be a successor of the Debtors. And at  
2       base, all testimony amounts to is simply some shreds of  
3       evidence that would support plaintiff's claims that default  
4       did exist, but those pieces of testimony do nothing to  
5       change the basis for this Court's holding that because these  
6       defaults were not timely asserted, they're forever barred.

7               If anything, this testimony actually supports  
8       Transform's conclusion because it suggests that the landlord  
9       could have ascertained and asserted these claims in response  
10      to the cure notice.

11             And very briefly, Your Honor, the final suggestion  
12      by Sayville that the Court use this opportunity to  
13      reconsider or revisit aspects of the decision in the  
14      dismissal order is procedurally improper six ways to Sunday.  
15      First, it is clear that the time for reconsideration or for  
16      appeal of that order has long since passed. The landlord  
17      took no efforts to timely assert a motion for  
18      reconsideration or an appeal, and it certainly can't seek  
19      affirmative relief in terms of untimely revisiting the  
20      dismissal order through an opposition to a motion to  
21      enforce.

22             Unless Your Honor has any questions, I'll cede the  
23      podium to Sayville and reserve reply.

24             THE COURT: Okay.

25             MR. BAUCHNER: Thank you, Your Honor. For the

1 record, Joshua Bauchner with Ansell, Grimm, and Aaron for  
2 Sayville. Your Honor, the entirety of the defendant's  
3 argument requires it to talk out of both sides of its mouth,  
4 and it does so repeatedly.

5 As an initial matter, on Page 5, Paragraph 6 of  
6 the reply brief, they say "Sayville argues that the  
7 dismissal order is unambiguous and Transform agrees." Well,  
8 if that's the case, then why is Transform submitting a  
9 revised order that materially changes the terms of the  
10 original order? If it's --

11 THE COURT: That's a good --

12 MR. BAUCHNER: -- unambiguous --

13 THE COURT: That's a good point. I think the  
14 order is unambiguous, and perhaps the only order I should  
15 issue is one that clarifies that unless the letter is  
16 withdrawn, I will hold your firm and your client in contempt  
17 of my order. Does that solve that problem? Did I lose you?  
18 I think I may have lost him. Mr. Barefoot, are you on the  
19 line?

20 MR. BAREFOOT: I am, Your Honor.

21 THE COURT: Mr. Bauchner, are you on the line?

22 MR. BAREFOOT: Yes, Your Honor, he still appears  
23 on the Court Solutions dashboard. I'm not sure what the  
24 issue is.

25 THE COURT: I'm not sure what happened there.

1 He's circled in gray now, though, opposed to --

2 CLERK: Judge, it's me, Arthur. I think we lost  
3 him.

4 THE COURT: Okay.

5 CLERK: Because I have tried to unmute him, even  
6 though I see him on the dashboard, but nothing is happening,  
7 and --

8 THE COURT: Well, try to -- make sure he's  
9 unmuted.

10 CLERK: Yeah, I have, and his box is totally gray  
11 from the others.

12 THE COURT: Yeah. Well, I guess we're going to  
13 have to wait until he gets back on.

14 CLERK: Yes. I'm going to see if we could get him  
15 on the line again. That's --

16 THE COURT: Okay, thank you.

17 CLERK: No problem, Judge.

18 THE COURT: (indiscernible). Well, I see Mr.  
19 Bauchner's colleague, Mr. D'Artiglio.

20 MR. BAUCHNER: Your Honor, I'm sorry. This is  
21 Joshua Bauchner. The Court Solutions is telling us that you  
22 put us on hold on my line --

23 THE COURT: Well --

24 MR. BAUCHNER: -- so we just held in --

25 THE COURT: All right.

1 MR. BAUCHNER: -- Mr. D'Artiglio's line. the last  
2 thing we heard you say was that you agree your order is  
3 ambiguous and it may be the only order that you needed to  
4 issue?

5 THE COURT: No, no. I said it's unambiguous.

6 MR. BAUCHNER: Unambiguous. Yes, Your Honor. My  
7 point is that then court -- the Court Solutions reported you  
8 put us on hold. We haven't heard anything that you said  
9 since then.

10 THE COURT: I didn't. I apologize for --

11 MR. BAUCHNER: No, absolutely. That's okay.  
12 That's why we dialed in on Mr. D'Artiglio's line.

13 THE COURT: Fine.

14 MR. BAUCHNER: So, I just -- we haven't heard  
15 anything --

16 THE COURT: The question was -- okay. So, I said  
17 very little after that. Just to repeat, I said that I agree  
18 that my January 2020 order is unambiguous and it would seem  
19 to me that rather than clarifying it, perhaps the right  
20 result here should simply be an order that states that  
21 unless the landlord withdraws the letter to Justice Jamieson  
22 from October 21 and its position taken in that letter, which  
23 it never took before me and can't take under my order, I  
24 will hold it in contempt and sanction it.

25 Does that deal with the adding to the order issue?

1 MR. BAUCHNER: Well, I don't know that it does,  
2 Your Honor, because I don't know that what we're doing  
3 doesn't comply with Your Honor's --

4 THE COURT: Oh, it clearly does not comply with my  
5 order, sir, and I'll get to that. But I'm just addressing  
6 your concern that somehow by adding addition language to the  
7 order I would be changing the order. And I don't want to  
8 change the order, because I believe it's crystal clear. So  
9 that's my proposed solution for it. You and Mr. Barefoot  
10 can think about that solution. But you can continue with  
11 the rest of your argument.

12 MR. BAUCHNER: Well, thank you. I appreciate  
13 that, and again, I apologize. We thought we were on hold  
14 and dialed in as quickly as we could again.

15 THE COURT: That's fine.

16 MR. BAUCHNER: Thank you. Your Honor, the  
17 language of the order is clear, and we agree, and it says  
18 defaults under the lease and leases capitalized. We'd also  
19 note that that language defaults under the lease came from  
20 the original proposed order from the defendant in this  
21 action. This is their proposed language, which the Court  
22 adopted.

23 Now what we have here, Your Honor, and what  
24 generated this concern initially, is a situation where the  
25 Debtor affirmatively denied in affidavits submitted under

1 the pain and penalties of perjury in the state court that  
2 there were any need for repairs to the property. A  
3 representative from the Debtor, who is now testifying on  
4 behalf of Transform, thereafter testified that there were  
5 innumerable problems with the property and that the  
6 affidavit that's submitted was false and that those defects  
7 and defaults were affirmatively concealed from plaintiffs in  
8 this action.

9 So, by the defendant's argue --

10 THE COURT: Which action are you referring to?  
11 Are you referring to the pre-petition state court action?

12 MR. BAUCHNER: I'm referring to the pre-petition  
13 state court action, which an affidavit was submitted by a --

14 THE COURT: Okay.

15 MR. BAUCHNER: -- a representative --

16 THE COURT: Fine. So how is that on fraud on this  
17 Court?

18 MR. BAUCHNER: Because in --

19 THE COURT: Did you reread the transcript of the  
20 hearing from --

21 MR. BAUCHNER: Yes, we did, Your Honor --

22 THE COURT: -- December of 2019?

23 MR. BAUCHNER: Many times.

24 THE COURT: Did you specifically read the section  
25 where I told you, contrary to your assertion, that a cure



1 notice is the Debtors' position in the bankruptcy case as to  
2 what defaults are owing, and it is not anything more than  
3 that? So, I fail to see any basis for any contention that  
4 there has been a fraud on this Court or that the argument  
5 you're making now has any weight or merit whatsoever with  
6 regard to the issue before me, which is merely an  
7 interpretation of my order which enforced another one of my  
8 orders which set a bar date for responding to cure notices.  
9 So, don't waste any more time on that argument.

10 MR. BAUCHNER: Your Honor, that's fine. If the  
11 fraud upon the Court is on the state court, we're happy to  
12 take it up with the state court. We, however, think that it  
13 is compelling and important that the Debtor concealed from  
14 this Court, because -- and maybe there is a fraud upon this  
15 Court, Your Honor, in that regard.

16 If the Debtor knew of all of these defaults and  
17 filed a cure notice with this Court that reflected zero cure  
18 costs, we would respectfully submit, Your Honor, that if  
19 they knew of those defaults and submitted that cure cost as  
20 zero, that would reflect a fraud upon the bankruptcy court.

21 THE COURT: It's not a pleading before the Court.  
22 It initiates a response, which your client was perfectly  
23 capable of doing, as we discussed at length during the  
24 December 2019 hearing in light of, among other things, its  
25 filing a proof of claim with respect to such defaults in

1 excess of 206 -- \$760,000.

2 MR. BAUCHNER: Your Honor --

3 THE COURT: Don't waste my time on this argument  
4 any more.

5 MR. BAUCHNER: That's fine, Your Honor. That's  
6 fine. So then maybe I just need to be clear, Your Honor,  
7 because -- and I raised this concern initially that there  
8 would be some confusion with the state court. Is it the  
9 Court's intention that whether we knew of a default or not,  
10 prior to the assignment and whether those defaults were  
11 affirmatively concealed or not, they are barred under Your  
12 Honor's order?

13 THE COURT: That is not the issue before me.

14 MR. BAUCHNER: Your Honor, that is exactly what  
15 they're proposed order suggests is the issue before you.

16 THE COURT: And I am saying that what I am  
17 prepared to deal with is your firm's outrageous letter to  
18 Justice Jamieson raising an argument that literally wasn't  
19 even raised before me, and after the fact, and completely  
20 contrary to the extensive colloquy you and I had at the  
21 December hearing, raise --

22 MR. BAUCHNER: Your Honor --

23 THE COURT: -- argument that is completely  
24 unfounded, and I am shocked that you would do this, although  
25 perhaps not, given the other arguments you've made in this

1 pleading and your commencement of the adversary proceeding  
2 in this Court originally.

3 MR. BAUCHNER: Well, I'm sorry --

4 THE COURT: This is not a Court of ready, shoot,  
5 aim. You have to actually act procedurally correctly, and  
6 you have not done so, repeatedly. So, I think you're lucky  
7 not to be held in contempt today.

8 MR. BAUCHNER: Well, I certainly --

9 THE COURT: I don't think you are a bankruptcy  
10 lawyer, so I'm cutting you some slack on that, but we spent  
11 about 20 minutes going through the rationale, with you  
12 asking me questions and me answering them as to the  
13 allocation of monetary costs that arose pre-assumption and  
14 post-assumption.

15 There was literally not one speck of an issue as  
16 to whether those were costs "after the calling of a default"  
17 or upon the exercise of remedies of a default under the  
18 lease, but rather the discussion was entirely consistent  
19 with the plain language of Section 365 of the Bankruptcy  
20 Code and how it has been interpreted, including by the  
21 District judge whose name sits on my courthouse, Judge  
22 Brieant in the AboveNet, SBC Telecom case.

23 No Court -- and I'm assuming this includes Justice  
24 Jamieson, who's quite an excellent judge -- appreciates  
25 someone gaming one Court against another, and that's exactly

1 what you're doing here.

2 MR. BAUCHNER: Your Honor, I'm sorry. That is  
3 certainly not our intent and I certainly apologize to the  
4 Court if it sees it that way.

5 THE COURT: Well, it is now crystal clear, so  
6 unless you withdraw this contention, I will hold you in  
7 contempt with regard to this letter.

8 MR. BAUCHNER: Then, of course, Your Honor, we  
9 will withdraw the letter. The issue arose in the state  
10 court action, and that's what necessitated the letter. The  
11 issue --

12 THE COURT: It arose because you raised it.

13 MR. BAUCHNER: No, Your Honor, it arose because  
14 the same representative from the Debtor testifying on behalf  
15 of Transform claims that previously there were no problems  
16 with the property and then testified that they knew about  
17 problems with the property the entire time.

18 THE COURT: Do you understand the concept of a bar  
19 date? I assume you do, because that was the basis for my  
20 January 9 order.

21 MR. BAUCHNER: We certainly do, Your Honor.

22 THE COURT: Your client was barred because it did  
23 not assert a cure claim by the deadline set by the Court.  
24 So, whether or not it lied before, the Debtor has the  
25 benefit of that order, unless you seek some other form of

1 relief, which you have not done. It's that simple. It  
2 doesn't --

3 MR. BAUCHNER: That --

4 THE COURT: -- matter that there was a default.  
5 You didn't assert it on a timely basis.

6 MR. BAUCHNER: We understand that --

7 THE COURT: What a bar date is, that's what the  
8 whole hearing was about on December 13th, 2019, and that's  
9 what my January 9th, 2020 order states.

10 MR. BAUCHNER: We understand that, Your Honor --

11 THE COURT: But to say that there was a default or  
12 that there was a lie about whether there's default or not,  
13 doesn't matter. Your client was aware of the claim. It  
14 asserted a claim in the bankruptcy case. We went through it  
15 at great length at the December hearing. My order is clear.  
16 You cannot pursue a claim for pre-assumption costs.

17 MR. BAUCHNER: We understand that, Your Honor.  
18 We're not seeking to. That's -- and maybe I'm not being  
19 clear, and I apologize.

20 THE COURT: Well, I don't --

21 MR. BAUCHNER: Your Honor --

22 THE COURT: At the same time, you're raising the  
23 point that the Debtor contended there were no pre-assumption  
24 costs, and now contends there were and it doesn't matter.  
25 So, don't raise the point. It doesn't matter because you're

1 time barred.

2 MR. BAUCHNER: Your Honor, it's -- the issue is,  
3 the issue that generated this, if I may, specifically  
4 related to the septic tank, which Your Honor stated at Page  
5 162, Line 13 of the transcript, was a post-assignment issue  
6 and is "different default in terms of timing because it is  
7 not part of the cure dispute and is a post-assignment  
8 dispute." That was a finding of this Court. You said --

9 THE COURT: Your letter of October 28th, makes no  
10 distinction on those grounds. It contends to the contrary  
11 that the only defaults barred by my order, the bidding  
12 procedures order, and -- frankly, doesn't even reference --  
13 yeah, it does reference the January 9 order as well -- are  
14 defaults that were actually given notice by the landlord,  
15 and that's just wrong. So --

16 MR. BAUCHNER: And Your Honor --

17 THE COURT: -- as far as the septic tank is  
18 concerned, that issue was not a factual finding by me and it  
19 is not an issue of judicial estoppel because contrary to the  
20 statement in your pleading, Transform did not win on that  
21 issue. In fact, they lost on that issue because I declined  
22 to take jurisdiction over it. Now, it is possible, I  
23 suppose, that Transform may be judicially estopped, i.e., by  
24 making a judicial admission, although you've not argued  
25 that, and it's quite possible they won't be, given the

1 context of the matter before me, which was not on the facts.

2 So contrary to what you just said, there was no  
3 factual findings by me. It was based on a motion to dismiss  
4 a complaint, and we all know that with a complaint, one  
5 takes as true the averments in the complaint unless they're  
6 contradicted facially by documents incorporated into the  
7 complaint or otherwise necessary to the complaint.

8 So, you may have some argument there on a judicial  
9 admission or, you know, on those grounds. I don't know, but  
10 that's not before me, either. What is before me is your  
11 attempt to argue to Justice Jamieson, withstanding my order,  
12 that somehow only a noticed, as per the lease, default is  
13 subject to the bar date and the bidding procedures order and  
14 my January 9th, 2020 order, and that is completely and  
15 utterly outrageous and completely contradicted by the entire  
16 context of Section 365 -- which I'll get into in a lengthier  
17 ruling in a minute -- the transcript of the hearing, and the  
18 order itself.

19 MR. BAUCHNER: Your Honor, I --

20 THE COURT: I don't think I could've been any  
21 clearer that the issue --

22 MR. BAUCHNER: Your Honor --

23 THE COURT: -- of allocating cost from what is  
24 pre-assumption and from what is post-assumption, and if the  
25 costs had arisen pre-assumption, they are barred by the

1 failure to assert them in response to the cure notice. If  
2 they truly arise post assumption, then they're not barred  
3 and Transform has to perform.

4 MR. BAUCHNER: We understand that, Your Honor.  
5 The problem is, in the state court proceeding, Transform is  
6 arguing to the contrary and that's what engendered the pre-  
7 motion request letter in the first instance.

8 In the state court proceeding, Transform is  
9 arguing something entirely different than what Your Honor is  
10 saying, and that's why they suddenly race back here, and I -  
11 - respectfully, Your Honor, you don't have the benefit of  
12 what's been happening in the state court proceeding, and I  
13 appreciate that, but they are arguing that the definition of  
14 pre-assumption costs includes any default, known or unknown,  
15 to the landlord at any point in time, which we respectfully  
16 submit, Your Honor, exceeds the bounds of your order and is  
17 not what was intended by your order.

18 THE COURT: That is not the subject of your letter  
19 to Justice Jamieson and it's not before me today.

20 MR. BAUCHNER: I understand that. I'm simply  
21 giving the Court some color as to what's happening in the  
22 state court proceeding, and we apologize if our letter to  
23 the state court was not clear in that regard, but that --

24 THE COURT: It wasn't clear at all in that regard.

25 MR. BAUCHNER: Fair enough, Your Honor.



1 THE COURT: It was completely point.

2 MR. BAUCHNER: Fair enough, Your Honor.

3 MR. BAREFOOT: Your Honor, if I could -- if I  
4 could briefly respond? This is Luke Barefoot from Cleary.

5 THE COURT: Well --

6 MR. BAUCHNER: (indiscernible).

7 THE COURT: -- Mr. Bauchner finish the rest of his  
8 presentation.

9 MR. BAREFOOT: I apologize.

10 MR. BAUCHNER: Thank you, Your Honor. So fine,  
11 Your Honor. We submit, the letter wasn't clear. We  
12 apologize. We will withdraw it in accord with Your Honor's  
13 directive. That's not a problem. The problem is, and this  
14 was very directly addressed before Your Honor that we were  
15 afraid that this Court's order would cause confusion in the  
16 state court, which is now has.

17 And we appreciate Your Honor's perspective that  
18 the order is unambiguous, and we agree. But the issues that  
19 have been presented to the state court by Transform, we  
20 believe undermine precisely what this Court argued, which  
21 was that these costs were a matter of allocation, which was  
22 the Court's term.

23 And what they are now arguing in state court was  
24 that every defect with the property, known or unknown to the  
25 landlord, which is why we raised the notice provision, is a

1 pre-assumption default and that everything was barred by  
2 this Court's order, which we think ignores the plain terms  
3 of this Court's order and ignores the bright line  
4 distinction between the defined term pre-assumption costs  
5 and post-assumption default.

6 They are now arguing in state court that  
7 everything wrong with the property was a pre-assumption cost  
8 barred by Your Honor's order. They are now arguing that  
9 everything was previously known -- and I know you don't want  
10 to hear that it was concealed -- but that everything was  
11 previously known as early as 2017 and '18, that everything  
12 is a pre-assumption cost -- this is what their witness  
13 testified to, Your Honor -- and that everything is just thus  
14 barred.

15 And as Your Honor held, this was a matter of  
16 allocation for the state court. As Your Honor further held,  
17 the ongoing deterioration of certain items was on -- was a  
18 burden for Transform to identify, because anything that  
19 arose, deterioration -- any deterioration that arose, excuse  
20 me, after the assignment remains the responsibility of  
21 Transform and that it was simply an allocation issue for the  
22 Court to make those determinations. For the state court,  
23 excuse me, to make those determinations.

24 So again, we apologize if the language in the  
25 letter wasn't clear in that regard, but that's what's

1 happening before the state court. They are taking Your  
2 Honor's order. They're alleging everything wrong with the  
3 property was known years ago, is a pre-assumption cost, and  
4 everything is thus barred. And was known to the Debtor,  
5 Your Honor, notwithstanding that the Debtor at that time  
6 submitted an affidavit to the Court to the contrary.

7 So, it's not just that the defendant is alleging  
8 what the defendant knew. The defendant is alleging what the  
9 Debtor knew. And so, Your Honor, I --

10 THE COURT: It doesn't matter what the Debtor knew  
11 as far as the bar date is concerned. It doesn't matter.

12 MR. BAUCHNER: We understand that for your  
13 purposes, Your Honor. We believe it matters in --

14 THE COURT: It -- and it --

15 MR. BAUCHNER: -- the state court.

16 THE COURT: And it's my bar date. It's my bar  
17 date.

18 MR. BAUCHNER: I understand --

19 THE COURT: It doesn't matter.

20 MR. BAUCHNER: Your Honor, I understand that it  
21 matters in the state court proceeding, as you indicated  
22 before because if the Debtor submitted an affidavit in the  
23 state court proceeding claiming everything was fine with the  
24 property and a representative -- the same representative  
25 who's employed by the Debtor now testifying on behalf of

1 Transform is testifying that the Debtor knew everything was  
2 wrong, we think that has an impact on the state court  
3 proceeding.

4 THE COURT: It doesn't.

5 MR. BAUCHNER: That's what this is about.

6 THE COURT: As far as the claim being barred, it  
7 doesn't.

8 MR. BAUCHNER: We understand that, Your Honor.

9 THE COURT: All that matters --

10 MR. BAUCHNER: We understand it doesn't.

11 THE COURT: -- is what your client knew or could  
12 have known in order to file a cure claim. That is all that  
13 matters.

14 MR. BAUCHNER: I agree with you, Your Honor. What  
15 we knew --

16 THE COURT: What the Debtor knew or didn't know is  
17 a complete red herring and it's barred. It shouldn't be an  
18 issue. Your -- that's res judicata, based on my order.

19 MR. BAUCHNER: Your Honor, I understand that. We  
20 understand that, Your Honor.

21 THE COURT: So, stop raising it.

22 MR. BAUCHNER: Well, it's barred by your order  
23 here, but it's not -- as you pointed out, it's --

24 THE COURT: It's res -- do you understand the  
25 concept of res judicate? It is barred, period.

1 MR. BAUCHNER: Your Honor, we do understand the  
2 concept.

3 THE COURT: Well, then --

4 MR. BAUCHNER: That's not --

5 THE COURT: -- stop saying it's not. It's a final  
6 order.

7 MR. BAUCHNER: Your Honor, I'm not --

8 THE COURT: Barred --

9 MR. BAUCHNER: Your Honor --

10 THE COURT: -- from saying that somehow, because  
11 the Debtor knew otherwise, the bar doesn't apply. That's  
12 just simply wrong. What is --

13 MR. BAUCHNER: Your Honor --

14 THE COURT: -- potentially relevant and for the  
15 state court to decide is whether your client knew or should  
16 have known in a way to make a claim. And frankly, it did  
17 file a claim and there may or may not be evidence as to  
18 specific other amounts which is an issue of fact for the  
19 state court to decide, whether it knew or should have known  
20 to make the claim.

21 MR. BAUCHNER: We completely agree, Your Honor.  
22 That's the point. That's the exact opposite of what  
23 Transform is arguing --

24 THE COURT: Well, I --

25 MR. BAUCHNER: -- in state court.

1 THE COURT: You know what, I don't know what  
2 they're arguing. You haven't raised it until this,  
3 literally, oral argument. It's not the subject of your  
4 letter that precipitated this motion before me, and frankly,  
5 I don't have much confidence that you're telling me the  
6 truth. So, I don't know --

7 MR. BAUCHNER: Your Honor --

8 THE COURT: -- what the extra issue is other than  
9 this septic tank issue, which we've already addressed. And  
10 the facts are there for the court to decide as to whether --  
11 the state court, as to whether the landlord knew or should  
12 have known of the existence of that problem and the need to  
13 cure it, which certainly could be done with money, and  
14 therefore it would fall within my order if it knew or  
15 should've known about it before the cure date and -- or  
16 didn't and couldn't have known about it before the cure  
17 date. It's a simple issue.

18 I don't know what other issues you're talking  
19 about and I don't need to get into -- what I do need to make  
20 clear to you, and I don't expect there to have to be another  
21 motion on this, is that the bar order is binding. And so,  
22 what the Debtor knew or didn't know, doesn't matter.

23 MR. BAUCHNER: Your Honor, what repairs were made  
24 or were not made are relevant to the allocation in state  
25 court. That's the point. And --

1 THE COURT: No, that's a new point you're raising,  
2 and it's enough. Stop raising them.

3 MR. BAUCHNER: Okay, Your Honor. I don't think  
4 they're new points. I think it's the exact argument we've  
5 made throughout the brief, and I don't think anything that  
6 I'm saying is new. Everything we're raising with the Court  
7 is in the brief, and the concern here, again -- and this was  
8 raised during oral argument during our colloquy, Your Honor,  
9 was that this was going to cause confusion in state court,  
10 and it now has, because they're arguing that everything is a  
11 pre-assumption cost and that there is no allegation,  
12 regardless of whether the Debtor knew or should have known  
13 of it, and that --

14 THE COURT: I don't have any example of what  
15 they're arguing. I don't have a brief. I don't have any  
16 other pleading, so what you're telling me is just, as far as  
17 I'm concerned, irrelevant and hot air.

18 MR. BAUCHNER: Well, I'm sorry, Your Honor. We've  
19 had a number of court conferences with the state court where  
20 this has come up --

21 THE COURT: That's fine.

22 MR. BAUCHNER: Unfortunately, they --

23 THE COURT: But you're asking me to weigh in on  
24 something that I have no factual basis to address. So --

25 MR. BAUCHNER: We're not asking you to weigh in on

1 -- we're not asking you to weigh in on anything, Your Honor.  
2 We didn't make the application to this Court. We're asking  
3 --

4 THE COURT: You're just -- you just said the real  
5 issue here, i.e., before me, is that Transform is  
6 misinterpreting my order in some way that you've not really  
7 specified specifically except with regard to the septic tank  
8 and I've addressed that point. So, there's nothing --

9 MR. BAUCHNER: Your Honor --

10 THE COURT: -- more to discuss.

11 MR. BAUCHNER: Your Honor, they're also  
12 misrepresenting -- they're also raising issues concerning  
13 the fire suppression system that they claim was a pre-  
14 assumption cost. I'm happy to go through the litany of  
15 these things with you, Your Honor.

16 THE COURT: No, you don't need to do it. It is  
17 really --

18 MR. BAUCHNER: I --

19 THE COURT: -- simple. Point one, what the Debtor  
20 knew or didn't know is irrelevant to the fact that the  
21 bidding procedures order and the assumption order and my  
22 January 9 order bar your client from asserting claims that  
23 it knew or could have known by the cure claim asserting  
24 deadline. It's irrelevant.

25 Point two, if there is some claim that your client



1 didn't know or couldn't have known with reasonable inquiry,  
2 then I would assume, as Justice Jamieson would conclude,  
3 that that is something that couldn't be barred because you  
4 couldn't have known about it.

5           There's really no more beyond that, other than the  
6 fact that, really separate and apart from that argument,  
7 which to me, frankly, seems to be a way to deflect the  
8 argument that actually is before me, this letter was sent  
9 which asserts a completely different basis for covering or  
10 trying to get your client out from under its failure to  
11 assert a timely claims, which is the completely unfounded  
12 assertion and really outrageous assertion that your client  
13 would've had to have called a default under the lease for  
14 that default to be barred by my order.

15           And that's just flat out wrong.

16           MR. BAUCHNER: Your Honor, the two points you just  
17 made are all we need, and thank you for that, because with  
18 that, we could bring it to the state court and clarify the  
19 entire issue, because -- and again, I appreciate Your  
20 Honor's frustration with this, but what's happening in state  
21 court is, I think, manifest and significant and I think  
22 we've -- you've addressed it perfectly for us with what you  
23 just said. We can give that to Judge Jamieson and she can  
24 proceed accordingly. But it does run contrary to what  
25 they've been arguing, and that's the concern. We didn't

1 come before the Court for this relieve, Your Honor. They  
2 did. We were simply --

3 THE COURT: I can see why they did, given this  
4 letter.

5 MR. BAUCHNER: Well, Your Honor, we were arguing  
6 in state court that pre-assumption costs were, as you said,  
7 those which were known or should have been known to us, and  
8 they've made the contrary argument that everything is a pre-  
9 assumption cost, regardless of whether it was known or  
10 could've been known, and that's --

11 THE COURT: And I want to be clear, because I do  
12 not want this misinterpreted, either, although there's no  
13 reason it should be, because the transcript is crystal clear  
14 on this. I gave you about four examples from the December  
15 transcript. My order does not apply to just literally  
16 liquidated costs.

17 It applies to bar pre-assumption costs that could  
18 be described and ultimately liquidated, so that, for  
19 example, if you would've asserted or you should've asserted  
20 or the client should've asserted a cure cost of X plus any  
21 additional amounts ultimately determined to have to be  
22 applied to fix whatever the condition was, that was covered  
23 by your proof of claim, for example.

24 So, it's not just the liquidated amount and I was  
25 crystal clear that what was barred includes that

1 (indiscernible) amount as fixed by the Court that is  
2 attributable to or allocatable to the pre-petition -- the  
3 pre-assumption period.

4 MR. BAUCHNER: We understand that, Your Honor.

5 THE COURT: So, I don't expect there to be any  
6 argument to the contrary of that, either. I don't know  
7 whether you would, but just to be safe, I'm reaffirming that  
8 point, which I made at length in the transcript of the  
9 December hearing.

10 MR. BAUCHNER: We understand that, Your Honor.  
11 Again, the issue is the known -- just like you said, Your  
12 Honor. Knew or should have known on the part of the  
13 landlord.

14 THE COURT: Okay. That's fine.

15 MR. BAUCHNER: And they're asserting something  
16 otherwise in state court, which again --

17 THE COURT: All right.

18 MR. BAUCHNER: -- was the concern, and --

19 THE COURT: All right.

20 MR. BAUCHNER: -- we want to address --

21 THE COURT: I will be clear. If there's a  
22 position taken contrary to that by your client in state  
23 court, I will hold it in contempt. I think there's  
24 literally no excuse at this point.

25 MR. BAUCHNER: Your Honor, and I would just hope

1 that if the same were true, that if Transform takes a  
2 position contrary to that, they would be an issue as well,  
3 because that's the concern here.

4 THE COURT: Okay.

5 MR. BAUCHNER: So, Your Honor, with that, I don't  
6 know that you want to hear more from me on this, frankly.  
7 So, we understand Your Honor's ruling and we're -- it is  
8 exactly what we've been arguing in state court and we're  
9 prepared to continue to argue that in state court, that it's  
10 an issue of allocation. It's an issue of what the landlord  
11 should've known or could've known, and nothing more. And  
12 the -- we'll also raise the other issues and concerns with  
13 respect to the affidavit that was submitted and the estoppel  
14 issues in state court, because we completely agree, Your  
15 Honor directed the state court to be the fact finder --

16 THE COURT: No.

17 MR. BAUCHNER: -- with respect to --

18 THE COURT: The affidavit has not relevance,  
19 unless it actually misled your client.

20 MR. BAUCHNER: Well, it --

21 THE COURT: What the Debtor knew has no relevance,  
22 and you count it as a fraud on the Court, and that's not  
23 applicable because your client is barred regardless of what  
24 the Debtor knew.

25 MR. BAUCHNER: Your Honor, it did mislead us

1 because their affidavit specifically said that --

2 THE COURT: That's a separate --

3 MR. BAUCHNER: -- conditions were --

4 THE COURT: -- issue, but you cannot say that  
5 somehow the Debtor committed a fraud on the Court that is  
6 relevant to the bar date, other than the issue of what your  
7 client knew.

8 MR. BAUCHNER: We understand that, Your Honor.

9 THE COURT: Or should have known.

10 MR. BAUCHNER: Again --

11 THE COURT: Well, again, that was not clear at all  
12 in your pleadings, which simply referred to the fact that  
13 the Debtor acted improperly, which --

14 MR. BAUCHNER: Well, Your Honor, we believe that  
15 an affidavit submitted to the state court under the pains  
16 and penalties of perjury that contains misinformation is for  
17 the state court to make a determination as to the  
18 significance of that affidavit. That's all I'm saying, with  
19 respect to the affidavit, and if state court --

20 THE COURT: It's not relevant to the bar.

21 MR. BAUCHNER: We understand, Your Honor.

22 THE COURT: The bar date.

23 MR. BAUCHNER: We understand that. It's relevant  
24 to the allocation issue. If they're claiming --

25 THE COURT: It's relevant to what your client knew

1 or should have known.

2 MR. BAUCHNER: Exactly right. Exactly right, Your  
3 Honor, and if they're telling us --

4 THE COURT: It's not an issue of fraud on the  
5 Court or sanctions that I should be awarding or anything  
6 like that.

7 MR. BAUCHNER: Completely agree, Your Honor --

8 THE COURT: which is what you argued in your  
9 objection, that somehow the Debtors' conduct should relieve  
10 your client of the bar date --

11 MR. BAUCHNER: Your Honor --

12 THE COURT: -- the order, and that's just not --  
13 it's not appropriate.

14 MR. BAUCHNER: Your Honor, we're arguing that the  
15 Debtors' conduct in the state court goes to the allocation  
16 issue in state --

17 THE COURT: Well, it doesn't. It doesn't go to  
18 the allocation issue at all. It may go to the issue of what  
19 your client knew or should have known, period, but nothing  
20 else.

21 MR. BAUCHNER: Agreed, Your Honor, and then what  
22 we knew or should have known goes to the allocation issue.

23 THE COURT: Only in that sense, and no other.

24 MR. BAUCHNER: Agreed. Agreed.

25 THE COURT: Okay.

1 MR. BAUCHNER: That's the point, and we agree with  
2 you that it's not before Your Honor as to the significance  
3 of a potentially perjurious affidavit submitted in the state  
4 court proceeding. That's for the state --

5 THE COURT: Well --

6 MR. BAUCHNER: -- to address.

7 THE COURT: I'm not sure I understand that. I  
8 guess you agree on that now, although you took up about five  
9 pages of your pleading as well as submitting lengthy  
10 exhibits and transcripts to the contrary, but I will ignore  
11 those because you're asking me to.

12 MR. BAUCHNER: Very good, Your Honor. Like I said  
13 before, I think we have said all we can say on this issue  
14 and we understand the Court's ruling.

15 THE COURT: Okay. Mr. Barefoot, do you have  
16 anything to add?

17 MR. BAREFOOT: Your Honor, I just want to clarify  
18 one point, which is that -- and I believe this is consistent  
19 with Your Honor's ruling. Transform is entitled through  
20 discovery or otherwise, to develop a record on what  
21 conditions existed and were known or could have been known  
22 to the landlord. And regardless of what was alleged in the  
23 adversary complaint before this Court, if the facts  
24 ultimately show that the septic tank, the fire suppression  
25 system, or any other issues existed and could have been

1       asserted by the landlord in response to the cure notice,  
2       those are barred, regardless of what was alleged in the  
3       adversary complaint as to when they arose.

4               THE COURT: No doubt.

5               MR. BAUCHNER: Your Honor, just to be clear, could  
6       have been asserted, depends on what we knew or should have  
7       known.

8               THE COURT: Well, of course, but that's what Mr.  
9       Barefoot said, that they're entitled to take discovery on.

10              MR. BAUCHNER: Understood. Understood, Your  
11       Honor, but we need to be very precise here, because it's not  
12       just that it could have been asserted. It's that we knew or  
13       should have known about them, and they have taken discovery  
14       on this issue --

15              THE COURT: That's fine.

16              MR. BAUCHNER: -- and --

17              THE COURT: I mean, obviously, if the discovery  
18       says we knew nothing about it and it was kept from us, you  
19       know, we don't have access. We don't inspect. Pretty  
20       clear.

21              MR. BAUCHNER: Again, we agree, Your Honor. It  
22       was kept from us. We were --

23              THE COURT: Well, I don't know. That's for  
24       Justice Jamieson to decide.

25              MR. BAUCHNER: Exactly right, which is exactly



1 what we're hoping for her to decide, Your Honor, and that's  
2 exactly what's happening in the state court now.

3 THE COURT: All right. Anything else?

4 MR. BAREFOOT: Your Honor, just one point in terms  
5 of this known or could have known standard. Obviously,  
6 there's a litany of cases in the mass tort context and  
7 otherwise, where even if the claimant had no reason or basis  
8 to know of the basis for a claim, if it was not asserted, it  
9 still cannot be asserted. So, I believe that it's a bit of  
10 a red herring to focus on what the landlord knew.

11 THE COURT: It's a red herring to focus just on  
12 what the landlord knew, but if the landlord really had no  
13 reason to know, I think that it's going to be hard to  
14 justify that a bar date would be binding on someone in that  
15 context.

16 MR. BAUCHNER: And Your Honor, what Mr. Barefoot  
17 said is the precise argument they're making in state court,  
18 which you just acknowledged it would've been hard for us to  
19 (indiscernible). That's, again, the concern in the state  
20 court proceeding, that it's -- regardless of what we knew or  
21 could have known, it's (indiscernible).

22 THE COURT: Okay.

23 MR. BAREFOOT: Your Honor, how would you prefer  
24 that we proceed in terms of settling an order? I do --

25 THE COURT: Well, let me --

1 MR. BAREFOOT: -- have a concern --

2 THE COURT: Let me give you my ruling, first.

3 MR. BAREFOOT: Okay, Your Honor.

4 THE COURT: I have before me a motion by Transform  
5 Operating Stores, LLC for an order clarifying and enforcing  
6 my order dated January 9, 2020 in this adversary proceeding  
7 which, granted in part and denied in part, as set forth in  
8 that order, Transform's motion under Bankruptcy Rule 7012,  
9 incorporating Federal Rule of Civil Procedure 12(b)(6), to  
10 dismiss the claims in the complaint, which sought payment by  
11 Transform of amounts claimed to be owing under the lease  
12 between Sayville Menlo, LLC, the plaintiff, and Transform as  
13 assignee of the lease from the Debtor, Sears.

14 The primary basis for the relief sought by  
15 Transform in that original motion was that the landlord,  
16 Sayville, had failed to assert any cure costs by the  
17 deadline set by the Court in its bidding procedures order of  
18 November 19, 2018 appearing at Docket 816 as then  
19 implemented through the Court's order authorizing the  
20 assumption and the potential assignment of the lease to  
21 Transform, appearing at ECF 3850.

22 The bidding procedures order provided that if a  
23 cure amount was not asserted timely in response to the cure  
24 notice, which was indisputably sent to Sayville, the cure  
25 amount set forth on the notice would be binding and no

1 further obligation under Section 365(b)(1) of a monetary  
2 nature would be owed by the Debtor and its assignee,  
3 Transform.

4 The Debtor put in its cure notice zero dollars  
5 owing and concededly, there was no timely response to that  
6 cure notice, and therefore, I concluded after a lengthy  
7 hearing on the motion that took place in December of 2019  
8 that all pre-assumption amounts owing would be barred, and  
9 therefore, claims in respect of those amounts should be  
10 dismissed.

11 I made it crystal clear in the order as I did  
12 during the oral argument that pre-assumption costs include  
13 any amounts required to cure defaults under the lease  
14 arising prior to the assumption and assignment date, whether  
15 they would be paid by a tenant directly to the landlord or  
16 by the tenant to third parties to perform repairs and the  
17 like.

18 The Bankruptcy Code provides, in Section  
19 365(b)(1), that "If there has been a default in an unexpired  
20 lease of the Debtor, the Trustee or Debtor in Possession may  
21 not assume such lease unless, at the time of assumption of  
22 such lease, the Trustee or Debtor in Possession cures or  
23 provides adequate assurance that the Trustee will promptly  
24 cure such default other than a default that is a breach of a  
25 provision relating to the satisfaction of any provision

1 other than a penalty rate or penalty provision relating to a  
2 default arising from any failure to perform non-monetary  
3 obligations under an unexpired lease of real property, if it  
4 is impossible for the Trustee to cure such default by  
5 performing non-monetary acts and, at and after the time of  
6 assumption, except that if such default arises from a  
7 failure to operate in accordance with a nonresidential real  
8 property lease, then such default shall be cured by  
9 performance at and after the time of assumption in  
10 accordance with such lease, and pecuniary losses resulting  
11 from such default shall be compensated in accordance with  
12 the provisions of this paragraph," i.e., cured or there be a  
13 provision of a prompt cure.

14 It was clear to me from the complaint and the  
15 record of oral argument that the repair and other defaults  
16 under the lease for purposes of the cure provision of the  
17 Bankruptcy Code could all be dealt with by the payment of  
18 money. Indeed, the plaintiff landlord had filed a proof of  
19 claim in respect of most of those asserted defaults,  
20 asserting monetary amount of at least roughly \$760,000, with  
21 the reservation that might more be owed -- more might be  
22 owed ultimately, once the claim was liquidated.

23 My order makes it, I believe, crystal clear that  
24 any such amounts owing, regardless of any specific provision  
25 of the lease notwithstanding, will be the responsibility of

1 the plaintiff as far as there being pre-assumption costs,  
2 because again, the bar date had been set and there was no  
3 response to the cure notice filed by the Debtors that  
4 asserted no cure amounts would be owing.

5 To fix the allocation as to any ongoing post-  
6 assumption performance obligations that did not arise pre-  
7 assumption and were not barred by the Court's prior orders,  
8 the parties returned to state court. The current motion  
9 arose because of a letter dated October 28, 2020 to the  
10 state court justice presiding over that litigation, the  
11 Honorable Linda Jamieson, sent by counsel for the landlord.

12 It asserted, quite shockingly to me, given the  
13 clarity of my January 9, 2020 order, the colloquy which was  
14 extensive, and oral argument with the landlord's counsel,  
15 and the fact that this point had never been raised before  
16 me, that only defaults noticed by the landlord under  
17 Paragraph 12.01 of the lease were covered by my order; i.e.,  
18 to be barred, by my prior orders, the default would've had  
19 to have been noticed formally by the landlord as set forth  
20 in the lease.

21 As I stated, this argument was never raised before  
22 me. If it had been, it would've been immediately shot down.  
23 The law is crystal clear that when Congress in the  
24 Bankruptcy Code refers, in Section 365(b)(1) of the Code, to  
25 a default in an unexpired lease, it is referring to a breach

1 of the lease, not to the mechanics of setting out the  
2 default. It is a more generic term of default under the  
3 lease.

4 To rule otherwise or to interpret the code  
5 otherwise would be to permit, as Judge Brieant held in the  
6 AboveNet case that I previously cited, to raise default  
7 later, in essence, hiding in the weeds, which would limit a  
8 Debtor's flexibility to determine whether to assume or  
9 reject a lease.

10 Indeed, Judge Brieant described that argument in  
11 the AboveNet case as "essentially frivolous." AboveNet v.  
12 SBC Telecom (2007 U.S. District Lexis 13651 at Pages 4-5  
13 S.D.N.Y. February 27, 2007). See also in re: Metromedia  
14 Fiber Network, Inc., 335 B.R. 41, 49-51 (Bankr. S.D.N.Y.  
15 2005).

16 The whole point of a cure notice procedure is to  
17 flag potential cure issues so that they can inform a  
18 Debtor's, its creditor constituents', and ultimately the  
19 Court's judgment as to whether a lease should be assumed or  
20 not, given the likelihood of potential defaults and the  
21 amount of them, to be followed up by a procedure to  
22 actually, if the default is timely asserted, liquidate the  
23 specific amount and provide for its cure or prompt cure, a  
24 regime that the Bankruptcy Code requires that is independent  
25 of and supersedes the regimen for calling a default under a

1 lease under applicable non-bankruptcy law.

2 The letter never should've been sent and, as I  
3 noted, I will grant the motion as follows. I will hold that  
4 the sending of the letter was a violation of a January 9,  
5 2020 order, and if it is not promptly retracted, and if the  
6 landlord fails to act in conformity with my ruling, I will  
7 in the future hold it in contempt on due notice to the  
8 landlord.

9 The objection to the motion asserts other points  
10 that are either legally or procedurally incorrect or both.  
11 I guess the first point I should address is the contention  
12 11 months after the entry of the now obviously final January  
13 9, 2020 order, that it was somehow incorrect as a matter of  
14 law and should be vacated. Of course, the time to make such  
15 a motion under Federal Rule of Civil Procedure 59,  
16 incorporated by Bankruptcy Rule 9023, has passed and there  
17 was no attempt to make such a motion under Bankruptcy Rule  
18 9024 incorporating Federal Rule of Civil Procedure 60.

19 Moreover, the contention is simply incorrect. As  
20 I noted from the plain language of the statute that I  
21 previously quoted, if a performance obligation can be  
22 quantified monetarily, it needs to be cured with money. The  
23 complaint and the proof of claim and the oral argument made  
24 it clear that each of these obligations could be cured by  
25 the payment of money. The caselaw cited for this section of

1 the objection was, therefore, completely off point and, in  
2 some cases, totally mis-cited. Whether it's monetary or  
3 non-monetary, the point is, must it be cured with money? If  
4 it must, then the bar date mechanism for responding to cure  
5 notice needed to be responded to and here, that was the case  
6 and it was not responded to.

7 In addition, the objection spent considerable ink  
8 on the notion that the Debtor committed a fraud on the  
9 court, not specifying which court. It is clear to me that  
10 the Debtor did not commit any fraud on this Court in any way  
11 and it should've been clear to counsel for the landlord,  
12 given the colloquy and oral argument in December of 2019, in  
13 which I made it clear that a cure notice is the Debtors'  
14 position on whether there is a cure or not, just as a  
15 landlord's response to a cure notice is merely the  
16 landlord's position on whether the cure amount is owing.

17 And ultimately, as set forth in the bidding  
18 procedures order and the assumption order, the Court sorts  
19 out the proper amount of cure, if there was a timely  
20 response to the cure notice.

21 As far as whether there was a fraud on the state  
22 court, again, that appears to me to be irrelevant and a red  
23 herring as far as to whether the Debtor is somehow estopped  
24 from relying upon the cure notice. It set a date to assert  
25 a cure claim. The landlord's failure to assert a cure



1 claim, unless it is excused for some reason applicable to  
2 notices setting such dates, i.e., it did not know nor could  
3 it have known of the existence of the claim, it has been  
4 argued, the landlord would be barred, period.

5 Finally, it is argued that because at oral  
6 argument in the December 2019 argument, counsel for  
7 Transform assumed that the so-called septic tank default was  
8 a post-assumption default. Apparently as asserted in the  
9 complaint, Transform should now be judicially estopped from  
10 asserting that it was a pre-petition default. I'm sorry,  
11 pre-assumption default. Clearly, and contrary to the  
12 assertion in the objection, Transform should not be  
13 judicially estopped from taking that position as required by  
14 the case law going back to New Hampshire v. Maine, 532 U.S.  
15 742, 749 (2011).

16 Judicial estoppel requires, among other things,  
17 that the party to whom it would apply be taking a position  
18 in front of a Court contrary to a position that it took in  
19 front of another Court, upon which it prevailed. Before me,  
20 Transform did not prevail on this position. Indeed, it lost  
21 on this position because I concluded that I did not have  
22 jurisdiction over the determination of the post-assumption  
23 cure amount, and therefore, would not decide it. I deferred  
24 instead, to the state court or to the parties to work out  
25 the amount.

1 Obviously, given that the motion before me was one  
2 to dismiss a complaint, that was not a factual finding by  
3 this Court, but based upon the assertions in the complaint  
4 and Transform's apparent understanding at that time, so  
5 judicial estoppel, which was argued here, may not apply --  
6 or does not apply. Excuse me. Whether any other doctrine  
7 of estoppel applies, I doubt, but it's not an issue before  
8 me.

9 So as far as the order is concerned, I don't need  
10 any further reinterpretation of the order granting this  
11 motion. What precipitated the motion was the October 28th,  
12 2020 letter and the order should state that that letter was  
13 in violation of my January 9th, 2020 order and that I will  
14 hold the landlord in contempt unless it is promptly  
15 withdrawn, and the landlord does not take the position  
16 asserted in that letter in the state court litigation.

17 So, Mr. Barefoot, I'd like you to prepare the  
18 order, but I think it should be that simple. It can refer  
19 to my bench ruling. You can provide Justice Jamieson with  
20 the transcript, if you wish, but I don't think we need any  
21 further interpretation of my order.

22 MR. BAREFOOT: We will do so, Your Honor. Might I  
23 also suggest that Your Honor so order the record of the  
24 proceedings today?

25 THE COURT: Well, there's really no -- there's no

1 such thing. But again, I have a bench ruling. I'll ask you  
2 to send me the transcript so that I can make sure it doesn't  
3 have typos or the like, and again, you can provide a copy of  
4 that to Justice Jamieson.

5 MR. BAREFOOT: We will do so, Your Honor.

6 THE COURT: Okay. Very well. All right.  
7 Anything else?

8 MS. MARCUS: Your Honor --

9 MR. BAREFOOT: Not from Transform, Your Honor.

10 MS. MARCUS: That brings us to the end of today's  
11 agenda.

12 THE COURT: Okay, very well. Ms. Marcus, I do  
13 want to ask you, at the monthly omnibus hearings, from time  
14 to time, Mr. Wander has said he wanted to hear the World  
15 Imports issue or have me hear it, and I thought I had  
16 scheduled it for this month. Has that now been resolved or  
17 do we need to check with someone else at Weil Gotshal?

18 MS. MARCUS: I think my partner, Gary Fail may be  
19 on, but I think he's in listen-only mode. I'm pretty  
20 certain it has not been resolved; although, perhaps relevant  
21 objection has been withdrawn. That's my --

22 THE COURT: Okay. All right. I thought that I  
23 had scheduled it for a hearing for this month, but maybe the  
24 parties have moved it by agreement. Anyway, one of my  
25 clerks will check with Mr. Fail to follow up on the status

1 of whether there are any remaining issues on that claim  
2 objection dispute that are going to be teed up in the near  
3 future.

4 MS. MARCUS: Okay, Your Honor. That would be  
5 better. Thank you.

6 THE COURT: Okay. Very well. Thank you. So, I'm  
7 going to hang up at this point. Thank you all.

8 MR. BAREFOOT: Thank you, Your Honor.

9  
10 (Whereupon these proceedings were concluded at  
11 11:28 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

A handwritten signature in dark ink, reading "Sonya M. Ledanski Hyde". The signature is written in a cursive, flowing style.

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: December 11, 2020

[& - afraid]

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